Supreme Court, U.S.
FILED
JAN 16 1996
OFFICE OF THE CLERK

No. 95 1138

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

UNDERWRITERS AND UNDERWRITING SYNDICATES AT LLOYD'S, and FOREIGN COMPANIES SUBSCRIBING TO SECOND EXCESS OF LOSS REINSURANCE CONTRACT NO. R64939,
Petitioners,

v.

THE NORTH RIVER INSURANCE COMPANY,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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62 pp

QUESTION PRESENTED

Whether an arbitration award may be confirmed where the parties to the arbitration were ordered to participate in a consolidated arbitration to which they did not consent and which was not contemplated by the terms of the arbitration agreement.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

Pursuant to Rule 29.1 of the Supreme Court Rules, Petitioners, London Market Reinsurers (Underwriters and Underwriting Syndicates at Lloyd's and Foreign Companies Subscribing to Second Excess of Loss Reinsurance Contract No. R64939) state upon information and belief that:

Those Underwriters at Lloyd's, London who severally subscribed, each in his proportionate share, Second Excess of Loss Reinsurance Contract No. R64939 in favor of The North River Insurance Company

Parent Companies: None

Affiliates or Subsidiaries (except for wholly owned): None

British & European Reinsurance Company, Ltd.

Parent Companies:

British & European Reinsurance Company, Ltd. is a wholly-owned subsidiary of Commercial Union Assurance Company plc which is a wholly-owned subsidiary of Commercial Union plc.

Affiliates or Subsidiaries (except for wholly-owned): None

Excess Insurance Company, Ltd.

Parent Companies:

Excess Insurance Company, Limited is a wholly-owned subsidiary of London & Edinburgh Insurance Group, Ltd. which is wholly-owned by Hartford International Insurance Company which is wholly-owned by Hartford International

Insurance Company which is owned by ITT Corporation.

Affiliates or Subsidiaries (except for wholly-owned): None

General Reinsurance, Ltd.

Parent Companies:

General Reinsurance is a wholly-owned subsidiary of Reinsurance Underwriting Services, Ltd. which is wholly-owned by General Re. Corporation.

Affiliates or Subsidiaries (except for wholly-owned): None

Generali, U.K.

Parent Companies:

Generali, U.K. is a wholly-owned subsidiary of Assicurazioni Generali.

Affiliates or Subsidiaries (except for wholly-owned): None

Stronghold Insurance Company, Ltd.

Parent Companies:

Stronghold Insurance Company, Ltd. is a wholly-owned subsidiary of NW Reinsurance Corporation, Ltd. The ultimate holding company is Norwich Winterthur Holdings, Limited. The holding company is controlled by Norwich Union Insurance Group of the United Kingdom and Winterthur Swiss Insurance Company of Switzerland, each of which owns 48.5% of the shares of the parent company; the balance is held by Chiyoda Fire & Marine Insurance Company (Europe), Limited.

Affiliates or Subsidiaries (except for wholly-owned): None

Turegum Insurance Company, Ltd.

Parent Companies:

Turegum Insurance Company, Ltd. is a wholly-owned subsidiary of Zurich Insurance Company (also known as Zurich Verrsicherungs Gesellschaft)

Affiliates or Subsidiaries (except for wholly-owned): None

World Auxiliary Insurance Corporation, Ltd.

Parent Companies:

World Auxiliary Insurance Corporation, Ltd. is a wholly-owned subsidiary of Commercial Union Assurance Company plc which is a wholly-owned subsidiary of Commercial Union plc.

Affiliates or Subsidiaries (except for wholly-owned): None

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.1	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
THE SECOND CIRCUIT'S DECISION IN THIS MATTER PUTS IT IN CONFLICT WITH CLEAR PRECEDENT OF THIS COURT AND WITH DECISIONS OF THE OTHER CIRCUITS	6
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
American Centennial Ins. Co. v. National Cas. Co., 951 F.2d 107 (6th Cir. 1991)	7
Baesler v. Continental Grain Co., 900 F.2d 1198 (8th Cir. 1990)	7
Champ v. The Siegel Trading Company, 55 F.3d 269 (7th Cir. 1995)	6, 7
Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A., 527 F.2d 966 (2d Cir. 1975)	*passim*
Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213 (1985)	6, 10
Del E. Webb Constr. v. Richardson Hosp. Auth., 823 F.2d 145 (5th Cir. 1987)	7
Government of the United Kingdom of Great Britain v. The Boeing Company, 998 F.2d 68 (2d Cir. 1993)	*passim*
Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983)	6
Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp., 873 F.2d 281 (11th Cir. 1989)	7
Volt Info. Sciences Inc. v. Board of Trustees, 489 U.S. 468 (1989)	6
Weyerhauser Co. v. Western Seas Shipping Co., 743 F.2d 635 (9th Cir.), *cert. denied*, 469 U.S. 1061 (1984)	7

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Certain Underwriters at Lloyd's, London and Foreign Companies Subscribing to Second Excess of Loss Reinsurance Contract No. R64939 respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit reversing the order of the United States District Court for the Southern District of New York which vacated an arbitration award.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 63 F.3d 160 (2d Cir. 1995). The opinion of the District Court is reported at 856 F. Supp. 850 (S.D.N.Y. 1994).

JURISDICTION

The Court of Appeals issued its decision on August 21, 1995. The Court of Appeals denied a petition for rehearing, and suggestion for rehearing *en banc* on October 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

At the heart of this matter is the question of whether a court can order consolidation of separate arbitrations absent the parties' consent. In a 1975 decision, *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), the Second Circuit Court of Appeals held that the "liberal purposes" of the FAA and the Federal Rules of Civil Procedure allowed courts to consolidate arbitration proceedings absent consent. In 1993, however, in *Government of the United Kingdom of Great Britain v. The Boeing Company*, 998 F.2d 68 (2d Cir. 1993), the Second Circuit recognized that intervening Supreme Court precedent had undermined the conclusion reached in *Nereus* and held that courts could not consolidate arbitration proceedings without the parties' consent. In this action, the district court ordered consolidation based upon the Second Circuit's opinion in *Nereus*. The matter proceeded to consolidated arbitration within days of the *Boeing* decision. After an award was entered in favor of the Respondent, on cross-motions to confirm and vacate the award, the district court vacated the award on the grounds that, in view of the intervening *Boeing* decision, it had improvidently ordered consolidation of the arbitration proceedings. On appeal, the Second Circuit reversed the vacatur. Although it acknowledged the district court's ability to review and correct its original decision, under appropriate circumstances, it nonetheless held, in effect, that the consolidation of arbitration proceedings absent the parties' consent would be permitted to stand based on equitable considerations. The Second Circuit's opinion marks an undeniable

retreat from the rule set forth in *Boeing*. Such retreat is not only in conflict with its prior ruling, it establishes a rule in the circuit which is in clear conflict with precedent established by this Court and the decisions of other circuit courts. On this basis, the grant of certiorari is both appropriate and necessary.

Respondent, North River Insurance Company ("North River") commenced this proceeding by petitioning for arbitration in 1988 in an attempt to maximize its reinsurance recoveries from Petitioners, ("London Market Reinsurers"), and Philadelphia Reinsurance Corporation, Assicurazioni Generali, and Excess and Casualty Reinsurance Association ("U.S. Reinsurers") for losses paid to GAF Corporation ("GAF") in connection with claims for asbestos-related injuries asserted against GAF.

Over the objections of both the U.S. Reinsurers and London Market Reinsurers, on May 23, 1991, the district court ordered the arbitration between North River and its U.S. Reinsurers to be consolidated with the arbitration between North River and London Market Reinsurers (Appendix D). The court did so expressly pursuant to the authority of *Compania Espanola de Petroleos, S.A. v. Nereus Shipping S.A.*, 527 F.2d 966 (2d Cir. 1975). The May 23, 1991 order further directed the procedure for selecting an umpire. On July 19, 1991, following the arbitrators' inability to agree on an umpire, the court issued a second order which appointed Mr. David Sherwood as umpire and directed that the arbitration proceed in accordance with the provisions of its May 23, 1991 Memorandum Opinion and Order (Appendix C). No judgment was entered on either order and the court expressly retained jurisdiction over the action to adjudicate any post-award applications.

Pursuant to the court's directive, the matter proceeded to a consolidated arbitration panel hearing. After four days of hearings in July 1993, and several weeks of deliberation, on October 21, 1993, the panel entered an award in favor of North River against the reinsurers.

Thereafter, North River moved before the district court for an order confirming the arbitration award. Both the U.S. Reinsurers and London Market Reinsurers cross-moved to vacate the award on several grounds: first, the district court lacked authority to consolidate the arbitrations absent consent of the parties; and second, the arbitration hearing was tainted by fundamental errors requiring vacatur of the award.*

The district court, exercising its plenary power to reconsider its previous rulings at any time prior to the entry of final judgment, vacated the award and ordered new, separate arbitration hearings. The court found that the reinsurers had not agreed, either by contract or by operation of law, to a consolidated arbitration and that the arbitration proceedings arose from separate agreements to arbitrate. It further found that its 1991 order of consolidation was based on authority which had been expressly overruled by the Second Circuit's June 29, 1993 decision in *Boeing* which established the following rule in the Second Circuit: "[t]he district court cannot consolidate arbitration proceedings arising from separate agreements to arbitrate, absent the parties' agreement to allow such consolidation." *Boeing*, 998 F.2d at 74. The district court concluded that it was bound by *Boeing* and that, pursuant to *Boeing*, the 1991 order of consolidation had been improvidently granted. Hence, the erroneous consolidation of the arbitrations required vacatur of the award.

North River had challenged the lower court's ability to review its 1991 order of consolidation, asserting that the 1991 order was final and that the reinsurers' failure to appeal from the order in 1991 barred collateral review. The district court rejected North River's argument, noting that it had not entered a judgment on the 1991 order of consolidation and that it had retained jurisdiction over the case. Thus, it held that regardless of whether the

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*** The district court did not reach this second ground but rather based the vacatur solely on its improvident order of consolidation.**

1991 order was appealable as of right, and notwithstanding the "law of the case" doctrine, it was empowered to review its earlier ruling because the Second Circuit's decision in *Boeing* announced a fundamental and binding change in the controlling law. The court also rejected North River's contention that the reinsurers were estopped from the relief sought because *Boeing* was decided some ten days before the arbitration hearing began. It ruled that there was no equitable bar against the relief sought by the reinsurers.

Finally, the court concluded that vacatur was required regardless of whether or not the case fell precisely within one of the grounds for vacatur specified in § 9 U.S.C. 10(a) of the Federal Arbitration Act ("FAA"). If, however, such a ground must be specified, the district court found that the proceeding was violative of § 10 (a)(4) of the Federal Arbitration Act in that, in conducting a consolidated hearing, the arbitrators exceeded the powers conferred upon them by the parties' contracts.

The Court of Appeals for the Second Circuit reversed the decision of the district court and remanded for consideration of the other grounds upon which vacatur was sought. Although the Court of Appeals found that the 1991 order was appealable as a final order, it did not decide whether the order had *res judicata* effect. Rather, it concluded that the district court "abused its discretion by reopening its decision to order a consolidated arbitration and by vacating the resulting arbitration award" 63 F.3d at 164 (Appendix A at 11a-12a). The court acknowledged that the "law of the case" doctrine does not bar review of a prior order where there has been a fundamental change in the governing law which impacts directly on the parties' rights. It held, however, that *Boeing* "did not in a very real sense" overrule *Nereus*. It further held that *Boeing* did not mandate vacatur of the consolidation order after the arbitration had already gone forward. The basis for both findings was the court's conclusion that the "general equitable powers of the court" permitted confirmation of an award in a consoli-

dated proceeding notwithstanding the absence of the parties' agreement to the consolidation. With this opinion, the Second Circuit is now in direct conflict with the other circuits and Supreme Court precedent which limits the powers of the court to enforcement of the parties' contractual arbitration agreements.

REASONS FOR GRANTING THE WRIT

This petition presents an important issue of federal law which implicates conflicts of authority in the lower courts as well as this Court's supervisory function in that the Second Circuit is not in conformity with precedent of this Court.

THE SECOND CIRCUIT'S DECISION IN THIS MATTER PUTS IT IN CONFLICT WITH CLEAR PRECEDENT OF THIS COURT AND WITH DECISIONS OF THE OTHER CIRCUITS.

This Court has clearly and repeatedly held that the Federal Arbitration Act was intended merely to assure the enforcement of privately negotiated arbitration agreements, despite possible inefficiencies created by such enforcement. *The Government of the United Kingdom of Great Britain v. The Boeing Company*, 998 F.2d 68, 72 (2d Cir. 1993); *citing, Volt Info. Sciences Inc. v. Board of Trustees*, 489 U.S. 468 (1989); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983).

Pursuant to the reasoning of these Supreme Court cases, all circuits which have addressed the issue have concluded that "absent an express provision in the parties' arbitration agreement, the duty to rigorously enforce arbitration agreements in accordance with the terms thereof as set forth in Section 4 of the FAA bars district courts from applying Rule 42(a) to require consolidated arbitrations, even where consolidation would promote the expeditious resolution of related claims." *Champ v. The Siegel Trading Company*, 55 F.3d 269, 274-275 (7th

Cir. 1995), *citing, American Centennial Ins. Co. v. National Cas. Co.*, 951 F.2d 107, 108 (6th Cir. 1991) ("a district court is without power to consolidate arbitration proceedings, over the objection of a party to the arbitration agreement when the agreement is silent regarding consolidation"); *Baesler v. Continental Grain Co.*, 900 F.2d 1193, 1195 (8th Cir. 1990) ("absent a provision in an arbitration agreement authorizing consolidation, a district court is without power to consolidate arbitration proceedings"); *Protective Life Ins. Corp. v. Lincoln Nat'l. Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989), ("the sole question for the district court is whether there is a written agreement among the parties providing for consolidated arbitration"); *Del E. Webb Constr. v. Richardson Hosp. Auth.*, 823 F.2d 145, 150 (5th Cir. 1987) (same); and *Weyerhauser Co. v. Western Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir.) (same), *cert. denied*, 469 U.S. 1061 (1984).

In *Champ*, the Seventh Circuit relied heavily upon the Second Circuit's decision in *Boeing*, stating that *Boeing* offers one of the best explanations for the rule. *Champ*, 55 F.2d at 275. In its decision in the instant matter, the Second Circuit has now limited the holding in *Boeing*, and in so doing, created a conflict among the Circuit Courts of Appeals.

The specific issue addressed in *Boeing* was whether the court had the authority to consolidate two separate arbitrations absent the parties' consent, notwithstanding that the arbitrations involved common issues of fact and law. The very same issue was presented to the district court in this case. In its 1991 opinion, relying upon the principles set forth in *Nereus*, the district court concluded that it did, indeed, have the power to consolidate the separate arbitrations absent the parties' consent. *Nereus* involved a contract of affreightment between the owner of vessels and the charterer which included an arbitration clause; by addendum to the contract, a third party (the "guarantor") agreed to perform the balance of the contract and assume the rights and obligations of the charterer under

the same terms and conditions as contained in the contract should the charterer default. After claiming default by the charterer, the owner sought to compel arbitration against the charterer and the guarantor in a single proceeding. The Second Circuit upheld the district court's finding that the guarantor agreed to arbitrate disputes by virtue of having agreed to assume the rights and obligations of the charterer under the original contract. It also affirmed the lower court's order of consolidation, over the owner's objection, holding that courts have the power to consolidate arbitrations absent consent pursuant to the Federal Rules of Civil Procedure 42(a) and 81(a)(3) and the Federal Arbitration Act. It was precisely this ruling that the district court relied on in 1991 in ordering consolidation.

In *Boeing*, the court was presented with arbitration agreements contained in separate contracts between the United Kingdom and Textron in connection with an accident involving the testing of a military helicopter with a fuel control system designed by Textron and installed by Boeing. The district court ordered consolidation of the United Kingdom's arbitrations against Boeing and Textron over the companies' objections. The circuit court reversed. In discussing its earlier opinion, the Second Circuit noted that *Nereus* was distinguishable in that it had determined that because all three parties were in arbitration pursuant to a single arbitration agreement, the intentions of the signatories to the addendum would be most closely adhered to with a single arbitration proceeding. In contrast, in *Boeing* there were two separate agreements to arbitrate contained in two distinct contracts; the court had no grounds to conclude that the parties consented to consolidated arbitration. Contrary to the holding in *Nereus*, the court found that the district court lacked authority to consolidate the two arbitrations based upon the mere fact that the disputes contained similar or identical issues of fact and law. Significantly, the court noted that in *Nereus* it had also relied on the Federal Rules of Civil Procedure and "the liberal purposes" of the FAA to compel consolidation. It also pointed out that since

its decision in *Nereus*, several district courts in the circuit, including the district court in this very case, had determined that they had the authority to compel consolidated arbitration in cases involving separate agreements to arbitrate but similar or identical factual circumstances and questions of law. The court then held that recent Supreme Court rulings had undermined its previous conclusion that the FAA's "liberal purposes" and the Federal Rules of Civil Procedure allow consolidation of arbitration proceedings absent consent and stated: "To the extent that Nereus relied on that conclusion it is no longer good law." *Boeing*, 998 F.2d at 71.

In its decision in this case, the Second Circuit has erroneously retreated from its very clear pronouncement in *Boeing*. In its efforts to sustain the arbitration results in this action, the Second Circuit sought to curtail review by invoking the "law of the case" doctrine. Despite its own plain acknowledgement in *Boeing* that *Boeing* changed the law of the circuit on the very principle in issue in this case, the court asserted that *Boeing* did not *really* overrule *Nereus* because *Boeing* did not disturb *Nereus* "to the extent it is based on the general equitable powers of the court and principles of contract law." 998 F.2d at 74. Implicit in this statement is the holding that notwithstanding the dictates of the parties' agreement, a court could nonetheless avert enforcement of the agreement on equitable grounds. Explicit in the court's ruling is the conclusion that the results of an improperly consolidated arbitration will not be vacated due to purely equitable considerations—i.e., that the flawed arbitration proceeded to conclusion.

The court's view that the general equitable powers of the court enable a court to consolidate arbitrations absent the parties' agreement is simply untenable in light of the Supreme Court precedent previously acknowledged in *Boeing*. The mandate of the Federal Arbitration Act is simply and *only* to enforce private arbitration agreements according to their terms. The holding by the Second Circuit to the contrary, postures it in direct conflict with

the rulings of this Court and the other circuit courts which have addressed this issue.

It is respectfully submitted that the Supreme Court should exercise its jurisdiction in order to secure uniformity among the circuits in the pronounced Supreme Court rule that the FAA is solely intended to enforce private agreements to arbitrate. The Court should also exercise its jurisdiction in order to ensure that its precedent is followed. The Supreme Court should make clear by this case that courts must look to the parties' agreement and should not consider the "equities" in enforcing arbitration agreements under the FAA.

This case implicates important and far reaching issues. This Court should make clear that its mandate in *Byrd* not be disregarded that "we [courts] rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation. . ." 470 U.S. at 221.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: New York, New York
January 16, 1996